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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

October Term, 1942.

No. 722.

STANDARD DREDGING CORPORATION,
Appellant,

v.

FRIEDA S. MILLER, as Industrial Commissioner of the State of New York, and MIKE CASSARETAKIS.

BRIEF OF APPELLEE STATE INDUSTRIAL COMMISSIONER IN ANSWER TO BRIEF OF GULF OIL CORPORATION, AS AMICUS CURIAE.

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BRIEF OF APPELLEE STATE INDUSTRIAL COMMISSIONER IN ANSWER TO BRIEF OF GULF OIL CORPORATION, AS AMICUS CURIAE.

The Facts Stated in the Gulf Oil Corporation Brief Involve a Situation Not Presented by the Cases Before this Court.

The brief submitted on behalf of Gulf Oil Corporation deals with facts very much different from those presented in any of the appeals that were argued before this Court—facts on which the New York Court of Appeals has not yet been called upon to express an opinion.

For instance, the second paragraph of the brief states (p. 4) that "New York's Unemployment Insurance Law has

the broadest extraterritorial effect," and it asserts that an employer is required under the New York law to make contributions to the state fund for services of an employee without the state as well as those performed within the state "even though he works only one day in New York and the rest of the time on the high seas or in another state." No decision of the New York courts, or even of the referees in the Division of Placement and Unemployment Insurance, is cited to support these contentions. In the above entitled appeal (Cassaretakis—No. 722), the claimant worked in New Jersey and New York and the dredge on which he had worked was later towed to Florida; yet the only service for which he was allowed benefits was the service in New York.

Surely the New York statute should not be condemned on the basis of its possible application to a hypothetical state of facts which is not before the Court where the precise application of the statute thereto cannot have been as thoroughly canvassed by the state court as the situations which were argued before the Court on May 5, 1943, and in fact has not been canvassed at all.

Moreover, as pointed out on the oral argument, the "turmoil" which Gulf Oil Corporation foresees arises not from the maritime character of its work but from its interstate character, a circumstance which does not constitute a ground for exemption from the Federal Act (Internal Revenue Code, § 1606(a)). Problems just as serious might be imagined with respect to interstate bus lines, interstate trucking lines, airplane companies and (prior to 1939) railroad companies; yet no interpretations of any State law seem to have been so burdensome or duplicative as to require court action during the seven years that the Unemployment Insurance Laws have been in effect.

Gulf Oil Corporation states (p. 5) that "multiple taxation was actually imposed" in the Bergen case, citing the Reply Brief in No. 723. This statement is incorrect for a number of reasons. In the first place, the decision in the *Bergen* case did not impose a tax, but simply recognized the claimant's right to unemployment benefits payable by the State of New York. In the second place, there has not been any determination that taxes are payable to New Jersey in respect of the employment for which claimant was awarded benefits by New York. The claim is based on a decision of a New Jersey Referee, which was rendered long before the original brief in No. 723, and which is presently on appeal. The New Jersey case relates to different years, and it nowhere appears that it involves the particular boat on which Bergen, the claimant in No. 723, was employed. The facts concerning the place of service of that boat are set forth at page 50 of the Record in No. 723. It also appears from the record in that case (R. 28) that the company has customarily been segregating its assets for the purpose of New York franchise tax; it should be able to do so equally for unemployment tax purposes. New York recognizes the principle that extra-territorial values should not be taxed (*People ex rel. Alpha Portland Cement Co. v. Knapp*, 230 N. Y. 48; *cf. Gwin v. Hemeford*, 305 U. S. 434); and there is no reason for invalidating the New York statute simply because of the possibility of its being applied in a manner to create double taxation. The claim of double taxation does not affect Nos. 722 or 783, and in any event arises not from the maritime character of the work but from its interstate character. Claimant in No. 723 was not a member of the crew of a vessel; and appellant in that case has withdrawn the assignments of error based on the ruling that claimant was not a member of the crew (Appit's brief in No. 723, p. 8-n).

The years in question in the cases before this Court are 1938 and 1939. The brief of Gulf Oil Corporation, however, complains (p. 6) of the fact that the New York statute which was construed in these cases, and which covered only employment where "the whole or greater part of the contract of employment is performed within this state" was amended in 1941. It is noteworthy in this connection that the change in the language respecting coverage of the statute was designed to conform to the model state law proposed by the Social Security Board.

I.

The New York Unemployment Insurance Law does not regulate the employment of seamen.

The first point of the argument in Gulf Oil Corporation's brief is based upon the theory that New York is attempting "regulation." As pointed out in our briefs and argument, the New York statute is a taxing statute and not a regulating statute.

The case of *People v. Compagnie Generale Transatlantique,* 107 U. S. 59, cited under that point (Brief, p. 7), did not relate to a non-discriminatory tax, but to a duty levied only on the admission of alien passengers at the port of New York, which was designed to exclude certain classes of aliens. *Henderson v. Mayor,* 92 U. S. 259, was similar.

II.

Congress has not occupied the field.

Gulf Oil Corporation's brief states in its second point that "Congress has occupied this particular field *of inter-*

state and foreign commerce • • •'' (p. 7—italics ours.) Again an erroneous theory is involved, for Congress has expressly provided that employers are not exempt from any tax because it impinges on ''interstate or foreign commerce'' (Internal Revenue Code § 1606(a)).

III.

Congress has not exempted officers and members of crews of vessels from state taxation.

The third point in Gulf Oil Corporation's brief deals largely with the subject matter covered in Point IV of our brief in No. 783. That argument need not be repeated here, but we desire to add a few words with reference to one of the cases cited by Gulf Oil Corporation, namely, *McGoldrick v. Gulf Oil Corporation,* 309 U. S. 414. This case was decided on the ground of a Congressional policy that petroleum, imported in bond and sold, after processing, to foreign vessels as ships' stores, should not become part of the common mass of taxable property within the state (see p. 429). For the reasons set forth in our brief in No. 783 (pp. 49-60), we ask this Court to find that there was no similar Congressional policy of exempting service as officers and members of crews from state taxation.

IV.

The contention that the Court of Appeals misconstrued the New York statute is inadmissible.

The fourth point in Gulf Oil Corporation's brief is based upon the 1936 opinion of the New York Attorney General. Such opinion did not constitute an administrative interpre-

tation of the Act. It merely represented the view which the New York Attorney General then entertained respecting this Court's decisions in *Southern Pacific Co. v. Jensen*, 244 U. S. 205, *Knickerbocker Ice Co. v. Stewart*, 253 U. S. 149, and *Washington v. Dawson*, 264 U. S. 219. If the view was sound, the legislature could do nothing to change the interpretation of the statute. What was stated in Brown, Regulations, Reenactment and the Revenue Acts (54 Harv. L. Rev. 377, at 390, cited at p. 12 of the Gulf Oil brief) is pertinent here, that "administrative rulings which have been coerced, or were supposedly required, by court • • • decisions, are of little authority." But clearly the early views of the Attorney General concerning the *Jensen* line of cases were not binding upon the Court of Appeals with respect to the interpretation of the New York statute; and no reason is advanced in Gulf Oil Corporation's brief why judicial reversal of even "a contemporaneous and long-continued executive construction" (heading, Brief, p. 11) raises any questions under the Federal Constitution—especially in the light of Chapter 454 of the New York Laws of 1942, referred to at page 6 of our brief in No. 783.

It should also be mentioned that Cassaretakis was not a member of the crew of a vessel, and consequently that his services were not excluded from the term "employment" under either the Federal Act or the New York Act as originally limited.

To support its contention that the Federal and State Acts should be co-extensive, Gulf Oil Corporation argues (Brief, p. 13) that "unemployment" must mean lack of the "employment" defined in the Federal act. If this were so, a worker in covered "employment" who shifted to a job in a concern which had less than eight workers, and there-

fore was not covered by the Federal Act, would be entitled to "unemployment" benefits, even though actually working. Congress surely never had any such intention.

Conclusion.

The decision appealed from should be affirmed.

Dated: May 12, 1943.

Respectfully submitted,

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